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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAR 25 2011

STATE OF NORTH DAKOTA

TONI WEEKS,

Appellant,

vs.

NORTH DAKOTA
WORKFORCE SAFETY & INSURANCE
FUND,

Appellee,

DAKOTA GASIFICATION CO.,

Respondent.

APPEAL FROM THE DISTRICT COURT ORDER DATED DECEMBER 8, 2010;
ORDER FOR JUDGMENT DATED DECEMBER 10, 2010; AND
JUDGMENT DATED DECEMBER 13, 2010
MERCER COUNTY DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE BRUCE A ROMANICK PRESIDING
MERCER COUNTY CIVIL NO.: 10-C-01132

SUPREME COURT CIVIL NO.: 20110024

APPELLANT'S BRIEF

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I. STATEMENT OF THE ISSUE

Is WSI's reduction of Toni Weeks' wage loss benefits by 60% a violation of equal protection guaranteed by both the United States and North Dakota Constitutions?

II. STATEMENT OF THE CASE

On October 2, 2009, Workforce Safety & Insurance notified Ms. Weeks that, because she became eligible for Social Security Retirement benefits on November 1, 2009, her Temporary Total Disability (TTD) benefits would end on October 31, 2009, and she would receive instead a benefit of $166.80 per week until March 10, 2026 (Appendix pp. 47 , 52 (App.)). Ms. Weeks disagreed with WSI's decision to cut her wage loss benefits by 60%, calling it discriminatory and unfair (App. p. 48).

On November 18, 2009, and February 9, 2010, WSI issued formal orders, effectively cutting Ms. Weeks' wage loss benefits by 60% (App. pp. 50-51; 54-56). Ms. Weeks again objected calling WSI's decision discriminatory, a denial of sure and certain relief, and unfair (App. pp. 53, 57). A formal administrative hearing was held on May 7, 2010 (App. p. 58). Administrative Law Judge Janet Demarais Seaworth ruled on May 25, 2010, that she was without authority to decide the constitutionality of N.D.C.C., Section 65-05-09.3 (App. p. 66).

Ms. Weeks appealed ALJ Seaworth's decision to the District Court (App. p. 15-16). On December 8, 2010, the Honorable Bruce A. Romanick, District Judge, affirmed WSI's reduction in Ms. Weeks' wage loss benefits as "rationally related to a legitimate government interest" (App. p. 97). Ms. Weeks has appealed Judge Romanick's decision to this Court (App. p. 102).

III. STATEMENT OF FACTS

Toni Weeks was 55 years old when she became disabled on May 4, 1999, following her second compensable injury (App. p. 20; 34). Ms. Weeks worked for Dakota Gasification, earning approximately $70,000.00 per year and contributing $1000.00 per month to her 401(K) savings/retirement plan (App. pp. 72, 74 - [CR 250; Hearing Transcript pp. 21, 30]). Following her second work-related injury, Ms. Weeks received both workers compensation disability benefits and Social Security Disability benefits (App. pp. 21, 22). Her benefits were offset by one half of her SSD benefits (App. p. 22). Following her disability, Ms. Weeks was forced to use all of her 401(K) savings to supplement her TTD and SSD benefits (App. p. 72 - [CR 250; Hearing Transcript, p. 21]).

IV. LAW AND ARGUMENT

The Fourteenth Amendment to the United States Constitution and Article I, Sections 21 and 22 of the North Dakota Constitution mandate equal protection and uniform application of law. It is Ms. Weeks' position that N.D.C.C., Section 65-05-09.3(2) is unconstitutionally discriminatory and unfair both as enacted and as applied.

N.D.C.C., Section 65-05-09.3(2) provides as follows:

> 2. An injured employee who begins receiving social security retirement benefits or other retirement benefits in lieu of social security retirement benefits, or who attains retirement age for social security retirement benefits unless the employee proves the employee is not eligible to receive social security retirement benefits is considered retired. The organization may not pay any disability benefits, rehabilitation benefits, or supplementary benefits to an employee who is considered retired; however, the employee remains eligible for medical benefits, permanent partial impairment benefits, and the additional benefit payable under section 65-05-09.4.

In determining the constitutionality of any statute, the Court is faced with a choice of the standard of review. In the instant case, Ms. Weeks has been deprived of her access to a civil tort remedy in exchange for "sure and certain relief." See: N.D.C.C., Section 65-01-01. Ms. Weeks contends that the statutory reduction in benefits mandated by N.D.C.C., Section 65-05-09.3(2) has left her impoverished and unable to replace her reduced benefits through dint of determination and hard work. Furthermore, the statute's application was triggered by Ms. Weeks' age, not any other change of circumstances. Consequently, N.D.C.C, Section 65-05-09.3(2) creates an inherently suspect classification and infringes Ms. Weeks' access to the civil court system by breaking the agreement to provide sure and certain relief. See: Haney v. North Dakota Workers Compensation Bureau, 518 N.W.2d 195(N.D. 1994); Baldock v. North Dakota Workers Compensation Bureau, 554 N.W.2d 441 (N.D. 1996).

When Toni Weeks reached "retirement" age, even though she remained disabled, WSI terminated her disability benefits and awarded her an "additional" benefit of 40% of her disability benefit amount (App. pp. 54-56). WSI's additional benefit amounts to 12.3% of Ms. Weeks' pre-injury wage (App. p. 55; App. p. 70 [CR 250 - Hearing Transcript] pp. 7, 9]). Not surprisingly, Ms. Weeks views WSI's actions as discriminatory and unfair.

There are two schools of thought on whether terminating or reducing a disabled worker's wage loss benefits when she reaches Social Security retirement age is discriminatory. The courts in Tennessee, Massachusetts, Washington, and Kansas have held that both worker's compensation and Social Security retirement benefits are wage-loss

replacement income, and thus one benefit can replace the other. See: In re Tobin, 675 N.E.2d 781, 783 (Mass. 1997); Vogel v. Wells Fargo Guard Servs., 937 S.W.2d 856 (Tenn. 1996); Harris v. Dept. of Labor & Indus., 843 P.2d 1056 (Wash. 1993); Brown v. Goodyear Tire & Rubber Co., 599 P.2d 1031, 1036 (Kan. Ct. App. 1979). Courts in other jurisdictions have held that worker's compensation and Social Security retirement benefits are not merely wage-replacement programs, and it is not rational to offset them against one another. See: West Virginia v. Richardson, 482 S.E.2d 162 (W. Va. 1996); Indus. Claim Appeals Office v. Romero, 912 P.2d 62 (Colo. 1996); Golden v. Westmark Cmty. Coll., 969 S.W.2d 154 (Ark. 1998); Reesor v. Mont. State Fund, 103 P.3d 1019 (Mont. 2004); Merrill v. Utah Labor Commn., 223 P.3d 1089 (Utah 2009).

As the Utah Supreme Court most recently noted in Merrill, supra, eligibility for Social Security retirement is based on several factors, including number of years worked and total amount contributed. The Utah court found no reasonable basis for substituting disability related benefits with age-related benefits. The benefits provided by the two programs are not duplicative; consequently, reducing workers compensation wage loss benefits for disabled workers receiving Social Security retirement benefits, without regard to amount or income from other sources, serves no legitimate legislative purpose. Merrill, supra, paragraph 20.

As the Montana Supreme Court noted,

> [B]oth classes have suffered work-related injuries, are unable to return to their time of injury jobs, have permanent physical impairment ratings and must rely on [the workers worker's compensation act] as their exclusive remedy under [the] law. . . . Furthermore, chronological age and the corresponding eligibility for social security retirement benefits is unrelated to a person's ability to engage in meaningful employment. Reesor at 1011.

The Utah Supreme Court concluded that,

> Because worker's compensation benefits and social security retirement benefits are not duplicative, offsetting workers' compensation benefits against social security retirement benefits is not a rational means to prevent the duplication of benefits or to achieve a solvent workers' compensation fund.

Merrill, supra paragraph 23.

Not only are the provisions of N.D.C.C., Section 65-05-09.3(2) discriminatory, both as enacted and as applied, but, as Ms. Weeks noted, the paltry "additional benefit" of 12.3% of her pre-injury wage is unfair, as well. Both the Utah and West Virginia Supreme Courts have noted that such a drastic reduction

> raises a genuine issue as to whether the workers' compensation scheme is an adequate substitute remedy for that which might be available in the tort system for such an injury, thus implicating the validity of the system as a substitute for access to the courts.

West Viriqina, supra at 168; accord Merrill, supra paragraph 34.

N.D.C.C., Section 65-05-09.3 creates a epresumption of voluntary retirement when a disabled worker reaches a certain age. The presumption is irrebutable and does not consider the disabled worker's actual retirement plans. Since the presumption inevitably results in a substantial reduction in wage loss benefits, it is per se discriminatory.

WSI has advanced several theories to justify its draconian reduction in injured workers' wage loss benefits at the very time in life when they can least afford it, e.g., prevention of "double dipping." WSI's justification is misplaced for a number of reasons: The statute only applies to the receipt of Social Security retirement benefits or benefits in lieu thereof (e.g., military retirement benefits). It does not address 401(K) plans, IRAs or other forms of retirement savings. It does not consider all retirement income, only one type. Furthermore, as

noted, Social Security retirement benefits are not based on "lost earnings capacity" as are disability benefits. They are not equivalent. Finally, both the Social Security Administration and WSI recognize that many people continue to work after retirement. Indeed, N.D.C.C., Section 65-05-09.3(3) provides that WSI must pay full TTD benefits if a worker is disabled due to a compensable work injury after presumed retirement.

WSI asserts the "additional" benefit paid under N.D.C.C., Section 65-05-09.4 fairly and appropriately treats disabled workers based on how long they've been disabled. Of course, that is only true if the presumption is correct; i.e., if they intended to fully retire at statutory retirement age <u>and</u> if, receipt of, at most, 3 1/3% - 33 1/3% of their pre-injury wage can be considered "sure and certain relief" <u>See</u>: N.D.C.C., Section 65-01-01.

Furthermore, if WSI is correct in its presumption that disabled workers such as Toni Weeks are retired, have no lost earnings capacity and are consequently not entitled to disability benefits, what is the justification for the "additional benefit" provided by N.D.C.C., Section 65-05-09.4? If it isn't a drastically reduced disability benefit, what is it? North Dakota Constitution Article X, Section 18 prohibits donations to any individual except for reasonable support of the poor. If WSI's actions have left Ms. Weeks and (others similarly situated) impoverished, how can it claim to provide sure and certain relief?

N.D.C.C., Section 65-05-09.4 exempts catastrophically injured workers from reduction in their disability benefits. Why? Their lost earning capacity is no greater than any other disabled worker. Either a person is able to return to 90% of her pre-injury wage or she isn't.

If she isn't, she is entitled to disability benefits, whether she is catastrophically injured or not.

State employees, teachers, highway patrolmen, and judges all receive benefits from state-controlled programs upon retirement. None of those programs require that an individual be eligible for Social Security retirement in order to start receiving state benefits. The only difference between a disabled worker and a retired teacher or judge is that the former cannot work and the latter chooses not to. There is no rational basis for treating disabled workers differently from other workers who reach Social Security retirement age.

There is no rational basis for: 1) an irrebutable presumption that a disabled worker inexplicably regains a lost earning capacity solely because she reaches retirement age; 2) treating Social Security retirement benefits differently than other retirement income; 3) considering 3 1/3% - 33 1/3% of pre-injury wages to be "sure and certain relief"; 4) providing full disability benefits to catastrophically injured workers who are no more disabled than others; (5) treating disabled workers frm other recipients of state controlled benefit plans who reach "retirement age," and 6) providing an "additional benefit" to retirees without a finding of indigence and without providing such benefit to all retirees, whether previously disabled or not.

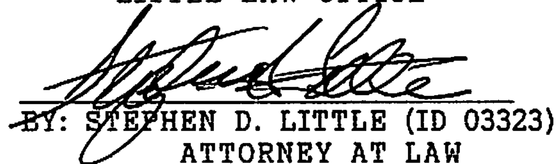
V. CONCLUSION

Ms. Weeks exemplifies the renowned North Dakota work ethic. She worked until she could not work anymore. If she is disabled and unable to work, it is because she sacrificed her body to perform a job that needed doing. Her employer paid her for her time and her labor, not for her body parts. Workers compensation benefits are intended to

fairly compensate Ms. Weeks for her work-related disability. Social Security retirement benefits are intended to provide an income based on age and contributions. The two benefits have different purposes. Substituting one for the other is, as Ms. Weeks has steadfastly asserted, unconstitutionally, unfair, and a violation of equal protection.

Respectfully submitted this 25th day of March, 2011.

LITTLE LAW OFFICE



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CERTIFICATE OF SERVICE

I, Stephen D. Little certify that on the 25th day of March, 2011, a true and correct copy of the Appellant's Brief with an attached Certificate of Service were mailed to the following:

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